SUPREME COURT, U. S.

JAN 5 1974

MICHAEL RODAK, JR., CLERK

No. 73-1054

In the Supreme Court of the United States

OCTOBER TERM, 1973

ANDREW RAYMOND, RAY BENNY ALEXANDER, DAVID COVITZ, and NOBLE LADELLA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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vs.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Andrew Raymond, Ray Benny Alexander, David Covitz, and Noble Ladella, your petitioners, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled cause on November 12, 1973.

OPINION BELOW

The opinion of the court below (Appendix A, *infra*, p. App. 1).

JURISDICTION

The judgment of the court below (Appendix A, *infra*, p. App. 1) was entered on November 12, 1973. A timely petition for rehearing was denied on December 12, 1973 (Appendix B, *infra*, p. App. 4). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the doctrine of *Dunn* v. *United States*, 284 U.S. 390, relating to inconsistencies between a verdict on several counts of a multi-count indictment, is available to save a conviction resting on the internal inconsistencies of a verdict on a single count indictment.

STATUTE INVOLVED

Section 1955 of Title 18, United States Code, provides in pertinent part as follows:

> § 1955. Prohibition of illegal gambling businesses
>
> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) "illegal gambling business" means a gambling business which—
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

STATEMENT

These four petitioners, together with two other named defendants—George Stavropoulos and Robert Crawford, who were acquitted—were charged in a single-count indictment with violating 18 U.S.C. §1955 in that they "did unlawfully conduct, finance, manage, supervise, direct or * own all or part of an illegal gambling business, such business being in substantially continuous operation for a period in excess of thirty days, involving five or more persons in its conduct, financing, management, supervision, direction and ownership, and being in violation of" cited provisions of the Criminal Code of the State of Indiana.

No point is made here concerning the duration or illegality of the "Barbut" game in question, nor about the power of Congress or prohibit the essentially intrastate gambling conducted at particular premises in East Chicago, Indiana.

The question presented by this petition turns on whether, with the conviction of only four of the six defendants named in the indictment, the prosecution proved what the statute requires, viz., that the gambling in issue "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business."

Just who the requisite five persons were was never very clearly indicated in the prosecutions' presentation of the case. In his closing argument, the prosecutor included in

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* Erroneously rendered as "and" in Appellants' Appendix and thus incorrectly set forth in both briefs below.

the required number of participants the two defendants who were eventually acquitted (Tr. 546-55). Sharpening his contentions on rebuttal (Tr. 618), the prosecutor named the six persons charged in the indictment; then "Charlie" —this was Charlie White, earlier conceded by the prosecutor to have been identical with the petitioner Andrew Raymond (Tr. 544)—plus one Shahbaz. But Shahbaz, a prosecution witness, had testified that he was primarily a gambler—it is common ground, based on explicit legislative history, that mere participants cannot be counted to make up the statutory minimum—and that he had sought to become a dealer but was never hired as such. (Tr. 421-29.)

The trial judge refused a defense request for an instruction that no defendant could be found guilty unless the jury found that at least five of "the named defendants or co-conductors" were involved in the gambling business.

The trial judge charged as follows on participation (Tr. 628-29):

> "* * * to 'conduct' means to act or carry on or to play a role in furthering an enterprise. If one is so engaged, the extent of his role does not matter.
>
> "Therefore, a person 'conducts' a gambling business if he carries on or plays a role in furthering such a business in any capacity other than a mere bettor. Shahbaz was a mere bettor even when trying to be a dealer, according to his testimony. To conduct would not include one who participates as a mere bettor, who is only entitled to winnings on his bets."

This followed an earlier portion of the charge that told the jury (Tr. 628):

> "If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt as to a particular defendant, then you should find that defendant guilty.

> "If, on the other hand, you find from your consideration of the evidence that any of these elements has not been proved beyond a reasonable doubt as to a particular defendant, then you should find the defendant not guilty."

On appeal, the court below, reviewing the evidence *de novo*, said:

> "There is sufficient evidence in the record to support the jury's determination that five or more persons were involved in the conduct of this business."

The court below then proceeded to sustain the judgment of the district court on a theory never presented to the jury, as follows:

> "This conclusion is not undermined by the acquittal of two of the six defendants. Even if the jury inconsistently (a) found Stavropoulos and Crawford not guilty, and (b) counted them as among the five persons conducting the business in determining the guilt of Raymond, Alexander, Covitz and Ladella, such inconsistency would not affect the guilty verdicts. 'Consistency in the verdict is not necessary.' *Dunn* v. *United States*, 284 U.S. 390, 393. Moreover, the verdicts are not necessarily inconsistent. The jury may not have been sure that Stavropoulos was the doorman, but nevertheless have been satisfied beyond a reasonable doubt that, apart from him, there were five persons, including the four convicted defendants, who were guilty. The statute does not require that each of the required five or more persons be identified."

REASONS FOR GRANTING THE WRIT

We have here a case where a verdict has been sustained on a theory never presented to the trier of facts, and on the basis of applying to an inconsistent verdict rendered on an indictment containing but a single count a doubtful and since discredited precedent that dealt with inconsistencies in verdicts on multi-count indictments.

First. "The rule that a man shall not be charged with one crime and convicted of another," first laid down by Chief Justice Marshall (*Schooner Hoppet* v. *United States*, 7 Cranch 389, 394), has since that time acquired constitutional stature. As formulated by Chief Justice Hughes, "Conviction upon a charge not made would be sheer denial of due process." *De Jonge* v. *Oregon*, 299 U.S. 353, 362. More recent affirmations and applications of this principle will be found in *Thornhill* v. *Alabama*, 310 U.S. 88, 96; *Cole* v. *Arkansas*, 333 U.S. 196; and *Garner* v. *Louisiana*, 368 U.S. 157, 164.

Yet that is precisely what was done here. Six defendants were charged with participation in gambling that was illegal under Federal law if but only if it involved five persons. We do not quarrel with so much of the charge (Tr. 628-29, quoted above), as gives effect to the legislative history (H. R. Rep. 91-1549, 91st Cong., 2d sess., 52-53), viz.,

> "The term 'conducts' refers both to high level bosses and street level employees. It does not include the players in an illegal game of chance, nor the person who participates in an illegal gambling activity by placing a bet."

We do however challenge the proposition that the acquittal by the jury of one shown by the evidence to have been a participant in the enterprise may nevertheless be taken as a finding by the jury that there were still sufficient participants, this in the face of a charge that did not present that alternative to them.

Again, we do not now question the footnoted statement in the opinion below that "the statute does not require that each of the required five persons be identified by name." But we do challenge the basic conclusion of the court below that, when the prosecution has convicted only four named defendants, their convictions can stand where neither the prosecution suggested, nor the trial judge instructed the jury, that they were free to acquit some of the defendants just as long as they found that the remaining persons on trial had participated in a five-person operation.

Finally, it must be strongly emphasized that the indictment charged, *in the alternative*, "conduct, finance, manage, supervise, direct *or* own." Consequently acquittal of any defendant necessarily absolved him of all participation in the enterprise, on any level, in any capacity, and under any of the specified statutory proscriptions. It therefore follows that the record destroys the theory on which the court below sustained these convictions.

Second. The reliance of court below on *Dunn* v. *United States*, 284 U.S. 390, 393, for the proposition that "Consistency in the verdict is not necessary," is wholly misplaced for a number of reasons. That ruling was doubtful when rendered, its rationale has since been completely undercut by later rulings of this Court, and it was rendered in a case that involved a multi-count indictment. The ruling below is the first one to apply its doctrine to an indictment containing only a single count.

A. *Dunn* v. *United States*, 284 U.S. 390, was the last opinion written by Mr. Justice Holmes—and it was the last because its formulation triggered his colleagues' demand that he resign. (Judicial retirement in its present form was not authorized before 1937.)

The *Dunn case* was announced on Monday, January 11, 1932. It would have been adopted at the Conference preceding that opinion day, which was then held on Saturday. Significantly, on the Sunday immediately following that Conference, Chief Justice Hughes called on the author judge to convey the views of a majority of the Court that the time had arrived for him to quit the bench. 2 M. J. Pusey, *Charles Evans Hughes* (1951) 680-82. On Monday Mr. Justice Holmes announced the opinion of the Court in the *Dunn* case; on Tuesday, January 12, he resigned (284 U. S. iii, vii).

B. In *Dunn*, the defendant had been acquitted on the two counts that charged, respectively, unlawful possession and unlawful sale of intoxicating liquor, but he was nonetheless convicted on the count that charged him with maintaining a common nuisance by keeping intoxicating liquor for sale. Sustaining the conviction on that count, over a long (284 U. S. at 394-407) dissent by Mr. Justice Butler, Mr. Justice Holmes said (284 U. S. at 393):

> "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it were a separate indictment. * * * If separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, acquittal on one could not be pleaded as *res judicata* of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold."

C. Later decisions, however, have completely undermined the foregoing rationale.

In *Sealfon* v. *United States*, 332 U. S. 575, the Court held that the doctrine of *res judicata* is applicable to criminal as well as civil proceedings, and that it operates to conclude those matters in issue that were determined by a previous verdict, even though the offenses were different. Consquently, since the petitioner had been acquitted of conspiring to defraud by posting false invoices, he could not thereafter be convicted of aiding and abetting the uttering and publishing of the same false invoices that had been introduced at the earlier conspiracy trial.

And in *Ashe* v. *Swenson*, 397 U. S. 436, it was held that the Fifth Amendment's guarantee against double jeopardy embraced the doctrine of collateral estoppel as a constitutional requirement. There, where petitioner had been acquitted of robbing one of six named poker players, he could not thereafter be convicted of robbing another participant in the same game: The first jury had determined by its verdict that petitioner was not one of the robbers.

Thus the court below, which sustained the conviction now in question in reliance on a single sentence from *Dunn* v. *United States*, 284 U. S. 390, 393, wholly overlooked the circumstance that everything in the key paragraph following the sentence that it quoted no longer represents the law of this Court.

D. The lapse is the more significant since the *Dunn* doctrine was formulated in a case involving a multi-count indictment while here the indictment contained but a single count and the inconsistency was bound up with that single count. There may still be some scope for *Dunn* where analysis shows that the inconsistency in the multi-count

verdict is apparent rather than real. See Bazelon, C. J., in *United States* v. *Fox*, 433 F.2d 1235, 1238-39 (D. C. Cir.). But nothing in the *Dunn* case, even when it was decided, and certainly not now after *Sealfon* v. *United States*, 332 U. S. 575, and *Ashe* v. *Swenson*, 397 U. S. 436, can justify reliance on its dictum to sustain what is here involved, an inherently inconsistent verdict on an indictment containing only a single count.

Third. Nearly 35 years ago, it was found necessary to carve the present Tenth Circuit out of the old Eighth. Act of February 28, 1929, c. 363, 45 Stat. 1346. That step was occasioned primarily by geography. But the current proposal to create two new and additional judicial circuits rests entirely on the fact that the federal courts are now so clogged with litigation that a virtual breakdown of justice impends. See Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Alternative Proposals* (Nov. 1973). It is in consequence more vital now than perhaps ever before that the outer parameters of federal jurisdiction be carefully, strictly, and indeed even jealously limited.

In view of *Perez* v. *United States*, 402 U. S. 146, it may well be too late to urge that not even an *ex parte* Congressional assertion, sugar-coated as a "finding", should be sufficient to transform the operation of a purely local and obviously piddling penny-ante gambling table into an affront to the federal criminal code. But it is surely appropriate to urge that, when the statutory tipping point for that transformation is fixed at five persons, those five should be pointed out with precision, determined to have been actual participants by a jury clearly instructed on that issue, and not—as in the present case—be simply

fashioned by after-the-fact speculation on the authority of a doubtful dictum from an unfortunate decision that has since been overborne in its own multi-count indictment application, and that is completely irrelevant here, where the indictment contained only a single count.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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January .... 1974.

APPENDIX

APPENDIX

APPENDIX A

Opinion and Judgment

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued October 15, 1973
November 12, 1973

Before
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. CHARLES EDWARD WYZANSKI, JR., *Senior District Judge**

(Nos. 73-1157, 73-1158, 73-1159, 73-1160)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
ANDREW RAYMOND, RAY BENNY ALEXANDER, DAVID COVITZ, and NOBLE LADELLA,
Defendants-Appellants.

Appeal from the District Court of the United States for the Northern District of Indiana, Northern Division, Hammond Division.
No. 72 H CR 7, George N. Beamer, Judge

* Senior District Judge Charles Edward Wyzanski, Jr., of the District of Massachusetts, is sitting by designation.

ORDER

Six defendants were indicted for conducting a gambling business in violation of 18 U.S.C. § 1955. Two were acquitted; the four who were convicted have appealed, primarily contending that the government failed to prove that five persons were involved in the conduct of a business as required by the statute. The contention rests on (a) the fact that only four of the defendants were convicted, and (b) the claim that other participants were not persons "who conduct, finance, manage, supervise, direct, or own all or part of such business" within the meaning of § 1955(b)(1)(ii).

There was testimony, which the jury was entitled to believe, that Raymond was the operator of the establishment; that he gave directions to Alexander and Covitz to start a "barbut" game; that the two dealers were thereafter replaced by two relief-dealers; and that another person served as a "doorman," accepting some, and rejecting other, requests for admittance. In *United States* v. *Hunter*, 478 F. 2d 1019 (1973), we held that "street level employees" such as "runners, telephone clerks, salesmen, and a watchman," as well as "high level bosses," could be counted among the required "five or more persons." *Id.* at 1021-1022. That holding is broad enough to encompass dealers, substitute dealers, and the doorman in this case even though the record does not disclose their compensation, if any. See also *United States* v. *Becker*, 461 F.2d 230, 232-233 (2d Cir. 1972). There is sufficient evidence in the record to support the jury's determination that five or more persons were involved in the conduct of this business.

This conclusion is not undermined by the acquittal of two of the six defendants. Even if the jury inconsistently (a) found Stavropoulos and Crawford not guilty, and (b) counted them as among the five persons conducting the business in determining the guilt of Raymond, Alexander, Covitz and Ladella, such inconsistency would not affect the

guilty verdicts. "Consistency in the verdict is not necessary." *Dunn* v. *United States*, 284 U.S. 390, 393. Moreover, the verdicts are not necessarily inconsistent. The jury may not have been sure that Stavropoulos was the doorman, but nevertheless have been satisfied beyond a reasonable doubt that, apart from him, there were five persons, including the four convicted defendants, who were guilty. The statute does not require that each of the required five or more persons be identified.[1] Defendant Alexander has filed a separate brief advancing three additional contentions which we also reject. (1) He argues that there is insufficient proof that the gambling business was in substantially continuous operation for a period in excess of 30 days. See § 1955 (b)(1)(iii). However, rent was paid for the five month period covered by the indictment; the nature of the operation indicated that it was continuing; government agents testified that gambling was in progress on February 14, March 21, and March 24; and another witness testified that he had played about four times a week for several weeks. There was ample evidence of continuous operation. (2) Alexander's attack on the constitutionality of the statute is foreclosed by *United States* v. *Hunter*, *supra*, at 1021. (3) Finally, we find no merit in the argument that the district judge abused his discretion in not allowing additional peremptory challenges.

The judgment is

Affirmed.

---

[1] In point II of their joint brief, defendants contend that the trial court erred in denying their request for an instruction that no defendant could be found guilty unless the jury found that at least five of "the named defendants or named co-conductors" were involved in the business. The request was properly denied because the statute does not require that each of the required five persons be identified by name.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
December 12, 1973

Before
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. CHARLES E. WYZANSKI, JR., SR. *District Judge**

(Nos. 73-1157, 73-1158, 73-1159, 73-1160)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ANDREW RAYMOND, DAVID COVITZ, NOBLE LADELLA and RAY BENNY ALEXANDER,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Indiana, Hammond Division.
(72 H CR 7)

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled causes, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled causes be and the same is hereby denied.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA

vs.

ANDREW RAYMOND, RAY BENNY ALEXANDER, DAVID COVITS, NOBLE LADELLA, GEORGE STAUROPOULOS, ROBERT CRAWFORD

NO. 72 H CR 7
Vio: Title 18, United States Code, Section 1955

The Grand Jury charges:

Beginning on or about October 15, 1970 and continuing to and including on or about March 28, 1971, in the Northern District of Indiana, Hammond Division,

ANDREW RAYMOND
RAY BENNY ALEXANDER
DAVID COVITS
NOBLE LADELLA
GEORGE STAUROPOULOS
ROBERT CRAWFORD,

defendants herein, did unlawfully conduct, finance, manage, supervise, direct or own all or part of an illegal gambling business, such business being in substantially continuous operation for a period in excess of thirty days, involving five or more persons in its conduct, financing,

management, supervision, direction and ownership and being in violation of the following laws: Indiana Burns Annotated Statutes, Criminal Code, Sections 10-2304, 10-2307, 10-2311, 10-2312 and 10-2331;

In violation of Title 18, United States Code, Section 1955.

A TRUE BILL:

.....

FOREMAN

.....

ASSISTANT UNITED STATES ATTORNEY